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**Bouille Clark Plumbing, Heating, and Electric, Inc.
and International Brotherhood of Electrical
Workers Local Union No. 139.** Case 3-CA-
22761

July 5, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND BARTLETT

On October 4, 2001, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent and General Counsel each filed exceptions and supporting briefs. The Charging Party filed cross-exceptions. The General Counsel and the Charging Parties filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, and to adopt the recommended Order² as modified and set forth in full below.³

ORDER

The National Labor Relations Board orders that the Respondent, Bouille Clark Plumbing, Heating, and Electric, Inc., Elmira, New York, its officers, agents, successors, and assigns shall

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The General Counsel, in exceptions, requested that the Respondent "reimburse employees who are entitled to backpay for any additional federal and/or state tax liability resulting from the lump sum payment of their backpay awards." This would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). In light of this, we believe that the appropriateness of this proposed remedy should be resolved after a full briefing by all affected parties. See *Kloepfers Floor Covering, Inc.*, 330 NLRB 811 fn. 1 (2000). Because there has not been such briefing in this case, we do not think it appropriate, at this time, to consider such a change. We therefore decline to order this relief. See *Ishikawa Gasket America*, 337 NLRB No. 29 at slip op. 2 (2001).

³ Backpay due to unit employees and benefit funds for the Respondent's failure to pay contractual wages and benefits shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). Interest on backpay amounts due to unit employees shall be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Any additional amounts due to fringe benefit funds will be calculated according to *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

1. Cease and desist from

(a) During the term of a collective-bargaining agreement, repudiating that agreement with Local 139, International Brotherhood of Electrical Workers, as exclusive bargaining representative of employees in the following appropriate unit:

All employees of the Respondent who perform commercial and residential electrical work, as described and covered in the inside construction agreements that commenced on June 1, 1995, and June 1, 1999, and the residential wiring agreements that commenced on April 1, 1994, and June 1, 1997.

(b) Refusing to adhere to its "inside construction" collective-bargaining agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Comply with the provisions of the 1999-2002 "inside construction" collective-bargaining agreement between the Southern Tier Chapter of the National Electrical Contractors Association and Local 139 of the International Brotherhood of Electrical Workers, including paying the wages and fringe benefits prescribed in the contract and adhering to the hiring hall provisions of the contract.

(b) Offer immediate and full employment to those work applicants who would have been referred to the Respondent for employment through the Union's hiring hall but for the Respondent's unlawful conduct.

(c) Make whole, with interest, any employees who should have been covered by the "inside construction" collective-bargaining agreements that commenced on June 1, 1995, and June 1, 1999, in the manner set forth in the judge's remedy, as modified by this Decision and Order, as well as any hiring hall applicants who should have been employed, for any losses they may have suffered as a result of the Respondent's failure to adhere to these contracts since January 2, 1996.

(d) Make whole, with interest, any employees who should have been covered by the "residential wiring" collective-bargaining agreements that commenced on April 1, 1994, and June 1, 1997, in the manner set forth in the judge's remedy, as modified by this Decision and Order, as well as any hiring hall applicants who should have been employed, for any losses they may have suffered as a result of the Respondent's failure to adhere to these contracts from January 2, 1996, through May 31, 2000.

(e) Make whole the appropriate contractual benefit funds for any losses they may have suffered from January 2, 1996, to the present, as a result of the Respondent's failure to adhere to the "inside construction" col-

lective-bargaining agreements that commenced on June 1, 1995, and June 1, 1999.

(f) Make whole the appropriate contractual benefit funds for any losses they may have suffered from January 2, 1996 through May 31, 2000, as a result of the Respondent's failure to adhere to the "residential wiring" collective-bargaining agreements that commenced on April 1, 1994, and June 1, 1997.

(g) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Elmira, New York, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 1996.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 5, 2002

_____ Peter J. Hurtgen,	Chairman
_____ Wilma B. Liebman,	Member
_____ Michael J. Bartlett,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT during the term of a collective-bargaining agreement, repudiate that agreement with Local 139, International Brotherhood of Electrical Workers, as exclusive bargaining representative of our employees in the following appropriate unit:

All employees who perform commercial and residential electrical work, as described and covered in the inside construction agreements that commenced on June 1, 1995, and June 1, 1999, and the residential wiring agreements that commenced on April 1, 1994, and June 1, 1997.

WE WILL NOT refuse to adhere to our "inside construction" collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL comply with the provisions of the 1999-2002 "inside construction" collective-bargaining agreement between the Southern Tier Chapter of the National Electrical Contractors Association and Local 139 of the International Brotherhood of Electrical Workers, including paying the wages and fringe benefits prescribed in the contract and adhering to the hiring hall provisions of the contract.

WE WILL offer full and immediate employment to those work applicants who would have been referred to us for employment through the Union's hiring hall but for our unlawful conduct.

WE WILL make whole, with interest, our employees, as well as hiring hall applicants who should have been employed, for any losses they may have suffered as a result of our failure to adhere to the contracts with the Union since January 2, 1996, and WE WILL reimburse employees for any expenses ensuing from our failure to make trust fund contributions.

WE WILL make whole the appropriate contractual benefit funds for any losses they may have suffered as a result

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of our failure to adhere to our contracts with the Union since January 2, 1996.

BOUILLE CLARK PLUMBING, HEATING,
AND ELECTRIC

Ron Scott, Esq., for the General Counsel.

Joseph J. Steflik Jr., Esq., of Binghamton, New York, for the Respondent.

James R. LaVaute and Stephanie A. Milner, Esqs., of Syracuse, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Elmira, New York, on June 27–28, 2001. The charge was filed October 23, 2000, and the complaint was issued February 27, 2001.

The complaint alleges that the Company authorized the Southern Tier Chapter of the National Electrical Contractors Association (NECA) as its collective-bargaining agent and agreed to be bound by current and subsequently approved inside construction agreements and residential wiring agreements entered into by NECA and the International Brotherhood of Electrical Workers Local 139 (IBEW). It is further alleged that from an unknown date, the Company refused to apply the applicable collective-bargaining agreements to certain covered employees and, since June 1, 2000, has refused to apply the inside labor agreement to any covered employees. This conduct is alleged to be in violation of Section 8(a)(1) and (5) of the Act. Respondent's answer denies the material allegations of the complaint and raises an affirmative defense pursuant to Section 10(b) of the Act.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, maintains an office in Elmira, New York, and has been engaged in business as a heating, plumbing, and electrical contractor in New York State. The Company admits and I find that in conducting its business, it purchased and received at its Elmira, New York facility goods valued in excess of \$50,000 from other enterprises located within New York State, each of which other enterprises had received these goods directly from points outside New York State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*²

Elmira is a small city located on the southern border of New York State. For over 50 years, various electrical contractors in the surrounding region have engaged in multiemployer collective bargaining through the Southern Tier Chapter of NECA. Their bargaining partner is the IBEW.

These organizations have entered into two types of agreements pertinent to this matter. Inside construction agreements govern all electrical construction work inside the property line of a worksite, except work performed by linemen. Residential wiring agreements govern a subset of this construction work, electrical work performed on residential construction not exceeding four stories in height. The residential wiring agreements provide that all signatory contractors must also sign and abide by the provisions of the more comprehensive inside construction agreements.

During the period under consideration, NECA and IBEW entered into inside construction agreements commencing on June 1, 1995, and ending on May 31, 1999, and commencing on June 1, 1999, and remaining in effect until May 31, 2002. (GC Exhs. 7 and 11.) They entered into residential wiring agreements commencing on April 1, 1994, and ending on March 31, 1997, and commencing on June 1, 1997, and ending on May 31, 2000. (GC Exhs. 8 and 12.) These agreements provided a detailed framework for labor relations, including recognition of IBEW as the exclusive bargaining representative and the exclusive source of referral for applicants for employment. Disputes were to be resolved through a grievance procedure and strikes were prohibited. Terms and conditions of employment were established and employers were required to make payments under a national employees benefit agreement. Payments were also required for medical insurance and, as authorized, for union dues.

The agreements provided that any employer could become bound to an agreement by signing a letter of assent. Once bound, a party to an agreement could terminate that agreement by providing written notice at least 90 days prior to the anniversary date of the agreement.

The Respondent, Bouille Clark Plumbing, Heating, and Electric, Inc., was incorporated on December 12, 1995. Shortly thereafter, on January 2, 1996, the Company's president, John H. Bouille Sr., signed letters of assent to the then-existing inside and residential agreements. (GC Exhs 9 and 10.) These letters of assent specifically committed the Respondent to abide by the terms of the applicable agreements and any subsequently approved agreements between NECA and IBEW. The letters of assent also provided that they would remain in effect unless the signatory gave written notice of intent to terminate at least 150 days prior to the anniversary date of any current agreement.

Here matters rested until January 1999. At that time, one of Respondent's employees, Phillip Daubner, telephoned Charles Patton, the business manager of IBEW, Local 139. He ex-

¹ The General Counsel's unopposed motion to correct the transcript, dated September 1, 2001, is received in evidence as GC Exh. 41. The motion is granted, except as to the proposed change to p. 418, l. 19. I recollect that I sustained the objection and that the transcript correction should be from "You can answer" to "You can't answer."

² The great majority of the facts set forth below are not in dispute. To the extent differences exist, weight has been given to the testimony of the former employees of the Respondent. Those persons testified in a credible manner and their accounts were both internally consistent and consistent with other testimony and documentary evidence. Significantly, of the two named principals of the Respondent, Bouille was not called to testify and Clark's testimony did not contradict the material allegations made by the former employees.

pressed dissatisfaction with his employer and sought new employment. At a subsequent meeting between Daubner and Patton, Daubner stated that there was something “funny” about the manner in which respondent paid overtime wages. However, he declined to provide specific information at that time. This incident was the first indication to Patton that there may have been problems regarding the Respondent’s compliance with the agreements.

In July 1999, another of Respondent’s employees, Scott Lombard, telephoned Keenan Eagan, the assistant business manager of Local 139. Lombard stated that he was performing electrical work and complained that he was not being paid “proper” overtime wages. It was also determined that the Respondent had failed to make any remittances to the Union on Lombard’s behalf.

As a result of these complaints, in July 1999, Patton and Eagan visited Respondent’s residential construction site in Lansing, New York. They observed a number of persons doing electrical work who had not been referred to the Respondent by the Union as required under the inside and residential agreements. Among the employees observed to be performing electrical work was Gary Rudy. Rudy showed the union officials copies of his timeslips and pay stubs. These demonstrated that the amount of his pay did not coincide with the number of hours of overtime he had worked. Specifically, he was not paid for overtime at the rate of time-and-a-half as required by the inside and residential agreements.

As a result of this investigation, on July 20, 1999, Patton filed a written grievance against Respondent, alleging violations of the residential agreement. In his grievance, Patton characterized the violations as “involv[ing] backpay, fringe benefits, union assessments.” (GC Exh. 13.) Additional information was requested and, on July 22, Patton provided further details. He alleged “numerous” violations of the exclusive hiring hall provisions of the agreement, violations of the remittance provisions, and overtime pay violations. (GC Exh. 34.) An additional charge was added to the grievance by Patton’s further letter of July 26. (GC Exh. 35.)

On July 30, 1999, a meeting was held between IBEW and NECA representatives regarding Respondent’s alleged violations. It was concluded that the violations were established. Patton requested 30 days to attempt to “work the problem out” with the Respondent. (CP Exh. 3.) Contemporaneously with this activity, the Union distributed a flier addressed to employees and former employees of Respondent. It advised them that the Union had learned that Respondent’s employees had been “underpaid” and may be owed compensation for overtime work, regular wages, health insurance, annuity savings, and pension credits. Affected persons were urged to contact Patton or Eagan. (R. Exh. 7.)

On August 27, 1999, Brad Clark, Respondent’s vice president, sent letters to Daubner and Rudy informing them that the company “may have inadvertently underpaid your past wages.” Each received a check for an amount in excess of \$2000. (GC Exhs. 38 and 40.) At the same time, Clark sent Patton a letter reporting that the Company “may have inadvertently underpaid its [Union] contributions.” A check for \$982.36 was included. (GC Exh. 16.) In response, on September 13, Patton wrote to Bouille, reminding him that the Company had filed letters of assent to the agreements but did not appear to be in compliance with the agreements. As a result, Patton requested a Union audit of the Company’s books. (GC Exh. 17.)

On September 15, Clark responded to the Union’s audit request, asking for details supporting the allegations of collective-bargaining agreement violations and asserting that the audit request was “overbroad.” (GC Exh. 18.) Patton responded by referencing the grievance proceedings and indicating that the Union would pursue legal action if the audit were not permitted. (GC Exh. 19.) On October 28, Clark rejected the Union’s audit request. (GC Exh. 20.) At the same time, Clark wrote to NECA advising that it “hereby withdraws its Designation of Bargaining from the Chapter [of NECA] and will conduct its own collective bargaining with IBEW Local No. 139 for a new agreement.” Clark also observed that it was his understanding that the current agreement expires “effective April 30, 2000.” (R. Exh. 6.) A copy of this correspondence was sent to Patton with a cover letter stating that the Respondent would “conduct its own negotiations for any successor agreement to the current collective-bargaining agreement which expires on April 30, 2000.” He further observed that he looked forward to scheduling negotiating sessions for this purpose. (R. Exh. 4.)

On November 8, the Union filed an unfair labor practice charge (Case 3-CA-22217) concerning the Respondent’s failure to provide the requested audit information. While this was pending, Patton had further communication with Clark regarding the Respondent’s practice of hiring of employees to perform electrical work without consultation with the Union. Clark responded by providing information regarding four such employees whom he characterized as residential wiremen trainees. He also noted that he had reviewed the agreement, “and will follow it’s guidelines for employees . . .” (GC Exh. 25.) Patton responded to this on January 28, 2000. He indicated that he had assumed that these trainees had been referred under the terms of the agreement, but had learned otherwise. As a result, he asserted that these employees were entitled to pay and fringe benefits as residential wiremen rather than as trainees. Patton also reminded Clark that the Company was a party to the inside agreement and that this agreement ran until May 31, 2002. He suggested further discussions. (GC Exh. 26.)

On February 8, 2000, Clark wrote Patton to advise that Respondent was providing notice of termination of “the collective-bargaining agreement” as of its anniversary date of May 31, 2000. (R. Exh. 5.) While this letter does not make specific reference to which of the two agreements (inside or residential) was being terminated, it is noted that the residential agreement was scheduled to terminate on May 31, 2000. The inside agreement is not scheduled to terminate until 2002.

The Union filed an amendment to its unfair labor practice charge on February 25, 2000. On March 25, 2000, that matter was resolved by settlement. Shortly thereafter (and in any event prior to April 10, 2000), the Union distributed a document entitled “B-C P, H&E EMPLOYEE NEWS” to current and former employees of Respondent. (R. Exh. 8.) This newsletter stated that there had been an “overwhelming” response³ to the earlier letter that had been mailed to Respondent’s employees. The newsletter went on to report that the responses to the first letter showed that a “much larger number of people [were] involved than originally thought and the number of allegations of abuses has increased.” It was noted that allegations

³ Counsel for the General Counsel characterizes the newsletter’s description as “a bit of hyperbole” given Patton’s testimony that the word “overwhelming” actually meant “more than two.” (GC Br., p. 16, fn. 30.) I concur with this characterization.

against the Respondent now included overtime violations, wage violations, cash payments, and improprieties affecting health insurance, the annuity fund, and profit sharing. Recipients of the newsletter were advised that appointments would be scheduled to take statements regarding these matters starting on the week of April 10.

In May 2000, the Union retained an auditor to conduct the audit of Respondent's records. This audit was completed on August 2, 2000. (GC Exh. 5.) The Union filed the instant unfair labor practice charge on October 23, 2000 and an amended charge on January 12, 2001.

Former employees of the Respondent gave substantial, uncontroverted, and credible testimony regarding the Respondent's hiring and employment practices. It is noteworthy that a variety of witnesses provided accounts consistent with each other. Even more significantly, they described specific incidents and statements involving Clark. Respondent offered Clark as a witness, but did not elicit any testimony from Clark that disputed the material allegations of the former employees. Thus, the evidence convincingly establishes that for many years the Respondent has essentially ignored the contractual obligations imposed by its assent to the terms of the inside and residential agreements. For example, John Sullivan testified that he had been an employee of Bouille Electric, another company owned by Bouille. In 1996, after the formation of Bouille-Clark, the new company hired Sullivan. He testified that 70 to 80 percent of the work that he performed for the Respondent was electrical work. He was not hired pursuant to the hiring provisions of the agreements and he was not paid for overtime work in the manner required by those agreements. Indeed, he described a company meeting held in October 1998 at which Clark told the gathered employees that there would be no overtime pay for new construction jobs. He continued to work for the Company until February 2000.

Gary Rudy testified that the Respondent hired him in the summer of 1997. He estimated that 45 percent of his working time consisted of electrical work. He was not hired through the hiring hall and was never told of any requirement that he obtain union membership. He was not compensated for overtime work in accord with the provisions of the agreements. He confirmed the details of his conversation with Patton and Eagan during their visit to the Lansing jobsite. He also testified that shortly after his provision of documentation to the union officials during their visit to Lansing, his work hours were cut and he was removed from all electrical assignments. Clark told him he would never work for Respondent again. Given the reduction in his work hours, Rudy successfully sought another position through the IBEW and left Respondent's employ.

Scott Lumbard testified that he was hired by the Company in late 1998 or early 1999. Clark never told him of the union membership requirements, but did tell him that there would not be a higher pay rate for overtime work on new construction projects. Lumbard also testified that he was instructed to prepare his timesheets in pencil instead of ink. Lumbard described the events that transpired during Patton and Eagan's inspection of the Lansing worksite and confirmed that he was doing electrical work for Respondent at that jobsite.

Edward Stowell provided particularly trustworthy testimony. The awkwardness of his position as a current employee of Bouille Electric only served to underscore the probative value of his account of his period of employment at Bouille Clark. He testified that he worked for Bouille Clark from approxi-

mately February to November 2000. He explained that he sought employment as an electrician and that Clark told him this was "fine," but he would have to be "classified" as a plumber. When Stowell asked why this was necessary, Clark told him the Company was having "problems" with the electrical union. Despite his classification as a plumber, Stowell testified that he worked as an electrician for 6 out of his 8 months of employment with Respondent. Indeed, Stowell indicated that he complained to Clark about having to do plumbing assignments and, in May 2000, he was assigned exclusively to electrical work. Among his electrical assignments at that time was installation of new electrical service for a building owned by Clark on Railroad Avenue. Stowell testified that on one occasion he was working on the outside of the building and was visited by Clark. In addition to providing job instructions, Clark commented to Stowell that he "hope[d] nobody sees us doing this." Stowell also described other electrical work he performed for Respondent during the summer of 2000.

In addition to the undisputed testimony of various former employees of the Respondent, Patton and Eagan testified to their observations during the site inspection in Lansing. At that time they observed several persons performing electrical work who had not been referred by the IBEW and whose work hours the Respondent had not reported to the IBEW. In addition Eagan testified that, by chance, in the late summer of 2000 he observed an employee of Respondent named Art Rose performing electrical work on the home of Eagan's neighbor. The electrical work that he saw was being performed on the outside of the home and a truck bearing signage for Bouille Clark was parked at the jobsite. Eagan further testified that Respondent had not made contributions to the IBEW on Rose's behalf.

B. Analysis

Section 8(a)(5) of the Act provides that an employer commits an unfair labor practice by refusing to engage in collective bargaining with the representative of its employees. Section 8(d) of the Act further states that the obligation to bargain collectively includes the obligation to comply with the terms and conditions of any contract that has been entered into by an employer and the representative of its employees.

In this matter, the Respondent did not negotiate directly with the Union, choosing to delegate this authority to a multiemployer association. The Board has held that members of a multiemployer association are obligated to comply with the contracts entered into by that association and that this duty is enforceable through the mechanisms of Section 8(a)(5). *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), *enfd.* 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889 (1988). On January 2, 1996, Respondent assented to become a member of NECA, the multiemployer association engaged in collective bargaining with the IBEW. In so doing, it became bound by the terms and conditions of the existing inside and residential collective-bargaining agreements and was legally obligated to comply with those agreements.

The agreements that were in effect on the date that the Respondent assented to membership in the multiemployer association were the inside construction agreement effective from June 1, 1995, through May 31, 1999, and the residential wiring agreement effective from April 1, 1994, through March 31, 1997. At all times since January 2, 1996, through the respective expiration dates of those agreements, Respondent remained a member of NECA and took no action to sever its membership

in the multiemployer association or to expressly repudiate either agreement.

By filing its letters of assent, Respondent not only became bound to NECA's existing collective-bargaining agreements with IBEW, it also assented to be bound by any subsequent collective-bargaining agreements approved by NECA. A subsequent inside construction agreement was approved by NECA commencing on June 1, 1999, with a termination date of May 31, 2002. In addition, a subsequent residential wiring agreement was approved covering the period from June 1, 1997, through May 31, 2000. For different reasons, Respondent contends that it is not bound by either of these agreements.

Regarding the 1997-2000 residential wiring agreement, Respondent asserts that it filed a proper and timely repudiation. In support of this contention, it cites three letters written by Clark. In letters to NECA and IBEW dated October 28, 1999, Clark advised that the Respondent was withdrawing "its Designation of Bargaining" from NECA and would conduct its own negotiations with IBEW for any successor agreement "to the current collective-bargaining agreement which expires on April 30, 2000." By letter dated February 8, 2000, Clark provided notice to the IBEW of the termination of the collective-bargaining agreement "on its anniversary date of May 31, 2000."

The IBEW contends that Clark's attempt to withdraw from NECA was ineffective. It notes that the withdrawal letters refer to a collective-bargaining agreement that expires on April 30, 2000. It also correctly observes that there was no such collective-bargaining agreement and that the actual residential wiring agreement was scheduled to expire on May 31, 2000, and that the inside construction agreement was not scheduled to expire until May 31, 2002. As a result, IBEW urges that Clark's letters of October 28, 1999, were too ambiguous to constitute an effective withdrawal from NECA.

The Board has recently addressed the requirements for withdrawal from a multiemployer association in *Haas Electric*, 334 NLRB No. 107 (2001). It held that an employer was deemed to have furnished continuing consent to an association to bind it to future contracts unless it took both timely and effective action consistent with the original agreement with the association to withdraw consent. In *Haas*, the Board found the employer's letter of withdrawal to be ineffective for two reasons. First, the letter of withdrawal simply stated that the employer was terminating the labor agreement and did not specifically revoke the association's authorization to negotiate a subsequent agreement. Second, despite the attempt to withdraw from the association, the employer continued to participate in negotiations between the association and the union. Thus, the employer's conduct was condemned as both hedging its bets and seeking the best of both worlds. This conduct is readily distinguishable from the Respondent's attempt to withdraw from NECA. Clark's letter specifically states that the Respondent is withdrawing its delegation of bargaining from NECA and goes on to state that the Respondent will conduct its own collective bargaining with IBEW. I find that this is an unambiguous and explicit withdrawal of bargaining authority and that it is not rendered ineffective by the incorrect reference to the expiration date of an existing agreement. Furthermore, the Respondent did not engage in any conduct that was inconsistent with its formal withdrawal from NECA. Therefore, Clark's letters constituted timely and effective action within the meaning of *Haas*.

Having effectively withdrawn its consent for NECA to bargain on its behalf, Respondent cannot be bound by any subsequent collective-bargaining agreements negotiated between NECA and IBEW. Nevertheless, it remained incumbent upon Respondent to comply with the terms of the collective-bargaining agreements that were already in effect, including provisions regarding termination of those agreements. *John Deklewa & Sons*, above.

Clark's letter of February 8, 2000 advised the IBEW that Respondent was terminating the collective-bargaining agreement "on its anniversary date of May 31, 2000." While this letter does not specifically identify the collective-bargaining agreement being terminated, it is readily apparent that it referred to the residential wiring agreement, as that was the only agreement with an "anniversary date" of May 31, 2000.⁴ Therefore, the evidence establishes that Respondent was bound by the residential wiring agreements in effect between NECA and IBEW from the date of its letter of assent on January 2, 1996, through May 31, 2000, but not thereafter.

The situation regarding the inside construction agreements is considerably different. There is no contention that Respondent took any formal action within the terms of the contracts to terminate any inside construction agreement. Rather, Respondent argues that the inside agreements were illegal ab initio, or alternatively, that they were effectively terminated by the Employer's course of conduct.

In characterizing the inside construction agreements as illegal, Respondent attempts to construe the relationship between the inside and residential agreements as one in which the IBEW requires an employer to enter into a contract covering work that it does not perform in order to obtain a contract for work that it does perform. The evidence does not support this characterization. Rather, the evidence demonstrates that the inside construction agreements cover the broad range of electrical work, including residential construction. Nothing in the extensive language of the agreements excludes residential work from their terms. More importantly, specific provisions governing residential work form a portion of the inside agreements, including a provision regarding the rate of overtime compensation for "[r]esidential service calls" (Inside construction agreements, sec. 9.05.) Specific reference to residential construction may also be found at section 9.08 regarding supervision of work. By their terms, the inside agreements govern residential construction of the type performed by Respondent.

Beyond the language of the agreements, the record contains considerable testimony regarding the customary applicability of the inside agreements to residential jobs. Patton testified that NECA members performed residential work under the inside agreements and that Bouille himself had applied an inside agreement to residential work performed by Bouille Electric. He further testified that Respondent had applied the inside agreement to residential work as recently as last year. Clark's testimony as to his understanding of the relationship between the inside and residential agreements was somewhat vague and contradictory. A fair reading of his testimony was that the Company did not wish to perform residential construction under the terms of the inside agreement as this could result in

⁴ Counsel for the Respondent specifically states that Clark's letters constituted a repudiation of the residential wiring agreement that was in effect from June 1, 1997, through May 31, 2000. (R. Br., p. 4.)

higher costs for labor.⁵ As a result, it only sought jobs that fell within the narrower confines of the residential agreement.⁶

In addition to the plain language of the inside agreements and the testimony establishing that the inside agreements did cover residential construction of the type performed by the Respondent, I note that the Board has had occasion to consider the relationship between similar inside and residential Agreements. In *Riley Electric*, 290 NLRB 374 (1988), the Board ordered the company to cease and desist from repudiating both an inside agreement and a residential agreement and characterized the appropriate unit as consisting of employees who perform work covered by the inside agreement and employees who perform work covered by the residential agreement.

Having found that the inside agreements applied to residential electrical work of the type performed by the Respondent, I cannot conclude that IBEW required Respondent to sign a contract for work it did not perform as a condition for providing a contract for work that the Company does perform.

Alternatively, Respondent argues that if it were bound by the inside agreements, it was free to repudiate the agreements at any time since it did not have any employees “who worked under the inside agreement.” (R. Br., p. 7.) An essential predicate to this line of reasoning is that, “Bouille-Clark operated only under the residential agreement.” (R. Br., p. 7.) Once again, this construction is based upon Respondent’s contention that the inside and residential agreements governed two entirely separate types of electrical work. As already discussed, the inside agreements do not exclude residential work from their ambit and specifically cover aspects of residential work such as overtime compensation within their explicit terms. Each residential agreement makes specific reference to the applicable inside agreement and requires that signatories “agree to abide by all terms and conditions of said [Inside] Agreement where applicable.” (Residential agreements, p. 5.) Thus, the proper construction of the relationship between the inside and residential agreements is that the inside agreement covers the universe of electrical work, including residential work, but is modified as to residential work by the terms of the more specific residential agreement. It follows that Bouille-Clark committed itself to operate under the terms of both types of agreements and could not repudiate either type of agreement except in the manner established by the terms of the respective agreements. As the current inside agreement does not terminate until May 31, 2002, Respondent has been bound by the terms of the applicable inside agreements at all times from the date of its letter of assent on January 2, 1996.

As I have determined that Respondent had binding contractual obligations under the inside and residential agreements, it is necessary to consider whether Respondent breached any of these agreements. As to this issue, the evidence was clear and convincing. This is most readily apparent regarding the failure to pay overtime at the rate of time-and-a-half as required by both the inside and residential agreements. The Board has noted that a failure to pay contract wages “is especially telling” and may be seen as striking a “death blow to the contract as a

whole” *Williams Pipeline Co.*, 315 NLRB 630, 632–632 (1994) (citation omitted). The uncontroverted testimony established that the Respondent had a practice of paying for overtime work at the rate of compensation established for work performed during the regular work schedule. This business decision was announced to employees by Clark at a meeting and was facilitated by the practice of requiring time sheets to be completed in pencil so that the number of hours could be adjusted to avoid paying the contractual rates for overtime work.

The evidence also clearly establishes that the Respondent violated a variety of other contractual obligations imposed by the inside and residential agreements. It failed to make benefit payments and other remittances on behalf of some employees performing electrical work. It failed to honor its agreement to utilize the Union as the sole and exclusive source of referral for applicants for employment and it failed to provide complete information to the Union, including information necessary for implementation of the union-security clauses of the agreements. The testimony and documentary evidence as fully developed establishes that the Respondent engaged in a pattern of non-compliance with crucial terms and conditions of the agreements. Given the nature and breadth of its noncompliance, its conduct constituted a repudiation of the collective-bargaining agreements in violation of Section 8(a)(1) and (5) of the Act.

C. The Affirmative Defense

Having found that the Company engaged in conduct constituting unfair labor practices, it is necessary to address the affirmative defense raised by the Respondent. The instant unfair labor practice charge was filed by IBEW on October 23, 2000. Respondent asserts that the charge was untimely as the Union had knowledge of the material facts more than 6 months prior to that date. As a result, it is contended that the provisions of Section 10(b) of the Act bar the complaint.

It is noted that many of the Respondent’s contractual violations took place long before the 6-month filing period set forth in Section 10(b). For example, Respondent directly hired John Sullivan in 1996 in violation of the agreements’ sole and exclusive union hiring referral provisions. The same was true for Gary Rudy who was hired in the following year. Scott Lumbard was hired in late 1998 or early 1999. Sullivan, Rudy, and Lumbard were not paid for overtime work at the rate specified in the agreements throughout their employment with Respondent. Given the nature and extent of Respondent’s contractual breaches prior to the 6-month limitation period, I find that Respondent did repudiate the agreements more than 6 months prior to the filing of the instant unfair labor practice complaint. However, the inquiry does not cease at this point. Counsel for Respondent correctly acknowledges that the 6month filing limitation may be tolled if deliberate concealment of material facts has occurred and the injured party was ignorant of those facts without fault or want of due diligence. (R. Br., p. 8, and the cases cited therein.)

The first hint of difficulties regarding Respondent’s compliance with the agreements occurred in January 1999 when Daubner contacted Patton and told him that there was something “funny” about the manner in which Respondent paid for overtime work. As Daubner declined to provide specifics, the Union’s failure to take further action was reasonable. Six months later the Union received a similar complaint from Lumbard. An investigation was commenced at that time and Respondent’s jobsite at Lansing was inspected. Immediately

⁵ Comparison of the wage rates between the inside and residential agreements shows that the residential agreements provide for a lower rate of compensation.

⁶ In any event, Clark disavowed any understanding of the relationship between the inside and residential agreements, referring to himself as “a simple plumber/mechanic, and I don’t understand those things.”

thereafter, a grievance was filed pursuant to the collective-bargaining agreements. In addition, the Union attempted to solicit further information from current and former employees of Bouille Clark and requested an audit of the Company. When this was declined, on November 8, 1999 the Union filed an unfair labor practice charge regarding this failure to provide information. After the complaint was resolved, the audit was conducted. It concluded on August 2, 2000 and the current unfair labor practice charge was filed on October 23, 2000.

The Union's course of conduct must be assessed within the Board's framework for analysis of 10(b) issues in the context of an alleged repudiation of a collective-bargaining agreement. In a leading case addressing this issue, the Board observed that "the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act." *A & L Underground*, 302 NLRB 467, 469 (1991). In that case, the Board noted that the respondent had sent a letter that severed the bargaining relationship "in one stroke." *A & L Underground*, above at 469. Several months later, the Board underscored the significance of the need for clear and unequivocal notice of repudiation. In particular, the Board held that failure to comply with some provisions of a contract did not, in itself, establish that the contract was being repudiated. Furthermore, a union's attempts to obtain compliance with the contract through picketing and filing a grievance were not found to constitute an acknowledgment that the contract had been repudiated. As a result, the Board found no merit in the company's 10(b) defense. *Adobe Walls, Inc.*, 305 NLRB 25 (1991).

As in *Adobe Walls*, the evidence reveals that Bouille Clark never provided the IBEW with clear and unequivocal notice of its intention to repudiate the agreements. Indeed, far from expressly repudiating the agreements, in August 1999, Clark sent letters to employees and to the IBEW claiming that the underpayment of overtime wages and benefits was "inadvertently" made. Implicit in this assertion is a recognition of the validity of the agreements' requirement for higher levels of pay for overtime work. Clark's contention that the contract violations were unintentional formed part of a deliberate pattern of concealment of his actual intention to repudiate the agreements.

In addition to claiming that contract violations were unintentional, Clark also made a specific promise to obey the contractual terms when he wrote to Patton on December 20, 1999, stating that he would follow the collective-bargaining agreement's "guidelines." (GC Exh. 25.) Respondent's claims of inadvertence and promises to rectify noncompliance are similar to the company's conduct in *Sterling Nursing Home*, 316 NLRB 413 (1995), where the Board affirmed the administrative law judge's rejection of a 10(b) defense since the company's promises and explanations left the Union with "no reason to believe that a completed violation had occurred." *Sterling Nursing Home*, above at 416.

In addition to the Respondent's attempts to lull the Union into inactivity by claims of inadvertence and promises of compliance, the evidence shows that Respondent took active steps to conceal its misconduct. The intent to engage in a clandestine repudiation is illustrated by Clark's behavior. Rather than openly refusing to comply with the overtime compensation provisions of the agreements, Clark instructed employees to complete their timesheets in pencil so that the hours worked could be adjusted to conceal the lack of proper compensation. Edward Stowell provided in addition, particularly compelling evidence of Clark's intent to deceive. Stowell testified that Clark told him that he would be classified

Clark told him that he would be classified as a plumber rather than an electrician since the Company was having "problems" with the Union. Since Stowell actually performed electrical work for the great majority of his time with the Company, this false classification was designed to deceive the IBEW. Stowell also provided another highly probative glimpse into Clark's mindset when he testified that Clark visited him at a jobsite on Railroad Avenue. At that location, Stowell was performing electrical work on the outside of the building and Clark commented that he hoped this was not being observed. In light of this pattern of concealment, the length of time required for the IBEW to understand that the contract had been repudiated does not appear unreasonable or suggestive of a lack of due diligence. Furthermore, Respondent's fraudulent concealment services as a basis for tolling the operation of Section 10(b). *Don Burgess Construction Corp.*, 227 NLRB 765 (1977), enf'd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

Respondent's 10(b) argument assumes that the 6-month period runs from the date of filing of the instant unfair labor practice charge on October 23, 2000. This assumption fails to give appropriate effect to the filing of the Union's first unfair labor practice charge on November 8, 1999. That filing resulted from the Respondent's failure to provide requested information that would have illuminated the Company's clandestine repudiation of the agreements. In similar circumstances, the Board noted that even where a union has a belief that misconduct has occurred such that it could have filed a charge alleging such misconduct, it was reasonable to pursue the alternate course of requesting additional information. Significantly, when the company refused to provide such information, the Board held that the resulting delay in filing the unfair labor practice arising from the decision to seek additional information "may fairly be laid at [the company's] doorstep" and would not result in a finding of untimely filing. *Barnard Engineering Co.*, 295 NLRB 226 (1989). Moreover, the Board has held that when successive complaints are sufficiently interrelated, the 6-month period should be measured from the date of filing of the first complaint. Thus, in *Wilson & Sons Heating & Plumbing, Inc.*, 302 NLRB 802 (1991), enf'd. denied 971 F.2d 758 (D.C. Cir. 1992),⁷ the Board found that where the conduct that triggered the union's information requests was the same conduct that constituted the alleged charge of unilaterally changing wage rates, the 6-month period should be measured from the time of filing of the original charge alleging failure to provide information. The case before me is essentially identical.

Applying the reasoning of *Wilson & Sons Heating & Plumbing* to this matter, the 6-month period is found to run from the date of filing of the first complaint on November 8, 1999. I find that the first occasion upon which the IBEW may by any stretch of imagination be deemed to have had any significant knowledge of the Respondent's contract repudiations was after Patton and Eagan's visit to the Lansing jobsite in July 1999. Therefore, the charge filed in November 1999 was a timely, reasonable, and diligent response to the developing situation. The combination of the Respondent's intentional acts of

⁷ In denying enforcement, the court did not criticize the Board's legal analysis regarding the impact of closely related filings on a 10(b) claim. Instead, the court found that the two charges at issue in *Wilson* were not closely related since the Board merely inferred that the audit request related to the wage claim. In the instant case, there is direct evidence that the audit was sought to obtain additional information regarding the failure to pay wages as required in the agreements.

fraudulent concealment and the IBEW's reasonable and diligent efforts to learn the facts and seek measured and appropriate remedial action compel a conclusion that the 10(b) defense must be rejected.

CONCLUSIONS OF LAW

1. By repudiating its collective-bargaining agreements with the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. By repudiating its collective-bargaining agreements with the Union, the Company violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to make whole employees, hiring hall applicants, and the Union for any losses they may have suffered as a result of the Respondent's failure to adhere to the inside construction agreements in effect between the Southern Tier Chapter of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers Local 139 from January 2, 1996. I shall also recommend that Respondent be ordered to make whole employees, hiring hall applicants, and the Union for any losses they may have suffered as a result of the Respondent's failure to adhere to the residential wiring agreements in effect between the Southern Tier Chapter of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers Local 139 from January 2, 1996, through May 31, 2000. Finally, I shall recommend that Respondent be ordered to comply with the terms of the inside construction agreement currently in effect between the Southern Tier Chapter of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers Local 139.⁸

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Bouille Clark Plumbing, Heating, and Electric, Inc., of Elmira, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) During the term of a collective-bargaining agreement, repudiating that agreement with Local 139, International Brotherhood of Electrical Workers, as exclusive bargaining representative of its employees covered by the agreement.

(b) Refusing to adhere to its inside construction agreement with the Union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole, with interest, any employees who should have been covered by the inside construction agreements that commenced on June 1, 1995, and June 1, 1999, in the manner set forth in the remedy, as well as any hiring hall applicants who should have been employed, for any losses they may have suffered as a result of the Respondent's failure to adhere to these contracts since January 2, 1996.

(b) Make whole, with interest, employees covered by the residential wiring agreements that commenced on April 1, 1994, and June 1, 1997, in the manner set forth in the remedy, as well as any hiring hall applicants who should have been employed, for any losses they may have suffered as a result of the Respondent's failure to adhere to these contracts from January 2, 1996, through May 31, 2000.

(c) Make whole, with interest, the International Brotherhood of Electrical Workers Local 139 Funds for any losses they may have suffered from January 2, 1996, as a result of the Respondent's failure to adhere to the inside construction agreements that commenced on June 1, 1995, and June 1, 1999.

(d) Make whole, with interest, the International Brotherhood of Electrical Workers Local 139 Funds for any losses they may have suffered from January 2, 1996, through May 31, 2000, as a result of the Respondent's failure to adhere to the residential wiring agreements that commenced on April 1, 1994, and June 1, 1997.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Elmira, New York, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

⁸ As to the nature and scope of appropriate remedial action, I have relied upon the Board's decision in *Industrial Turn Around Corp.*, 321 NLRB 181 (1996), enf'd. in part 115 F.3d 248 (4th Cir. 1997). As to the applicable time period for such remedial action, it is noted that the Board has recognized that extension of the remedy well beyond the 10(b) date is appropriate under these circumstances. *Vallow Floor Coverings, Inc.*, 335 NLRB No. 7 (2001). The employee backpay remedy is to be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The remedy regarding fund contributions should be applied as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enf'd. mem. 661 F.2d 940 (9th Cir. 1981).

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 4, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT, during the term of a collective-bargaining agreement, repudiate that agreement with Local 139, Interna-

tional Brotherhood of Electrical Workers, as the exclusive collective-bargaining representative of our employees covered by the agreement.

WE WILL NOT refuse to adhere to our collective-bargaining agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make our employees, as well as hiring hall applicants who should have been employed, whole, with interest, for any losses they may have suffered as a result of our failure to adhere to WE WILL reimburse employees for any expenses ensuing from our failure to make trust fund contributions.

WE WILL make whole the International Brotherhood of Electrical Workers Local 139 Funds for any losses they may have suffered as a result of our failure to adhere to the contracts with the Union since January 2, 1996.

BOUILLE CLARK PLUMBING, HEATING,
AND ELECTRIC, INC.